

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	WC Docket No. 04-405
For Forbearance Under 47 U.S.C. § 160(c) From)	
Application of <i>Computer Inquiry</i> and Title II)	
Common-Carriage Requirements)	

COMMENTS OF QWEST CORPORATION

Qwest Corporation (“Qwest”), respectfully submits these Comments to BellSouth Telecommunications, Inc.’s (“BellSouth”) Petition for Forbearance (“petition”), dated October 27, 2004.¹ BellSouth seeks forbearance from the *Computer Inquiry* rules to the extent they require incumbent local exchange carriers (“LECs”) to tariff and offer the transport component of their broadband services on a stand-alone basis and to take service under those same terms and conditions. Further, BellSouth seeks forbearance from Title II common carriage requirements that apply to incumbent LEC broadband transmission.

I. BACKGROUND

LECs are subject to the full weight of *Computer Inquiry* and Title II obligations when they provide broadband transmission services. In its petition BellSouth documents the costs of this regulatory disparity, estimating that the *Computer Inquiry* requirements alone caused BellSouth to spend \$3.50 per customer per month, or \$48.3 million in 2003.² Cable modem

¹ See *Public Notice, Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications Inc. Regarding Incumbent LEC Provision of Broadband*, DA 04-3507, WC Docket No. 04-405, rel. Nov. 3, 2004. And see *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*.

² BellSouth petition at 5, 21.

providers are free to do business without the *Computer Inquiry* restrictions and their associated costs.

Qwest believes that the persistent regulatory asymmetry is contrary to the public interest and thwarts Congress's goal of promoting the deployment of high-speed telecommunications capabilities "without regard to any transmission media or technology[.]"³ The Commission stated in its petition for certiorari in the *Brand X* case that it deems maintaining regulatory freedom for cable modem service an issue of "exceptional national importance,"⁴ and explains that regulating broadband Internet access service as a telecommunications service "is inconsistent with, and would directly threaten,"⁵ the federal policy of promoting broadband deployment. The Commission has successfully petitioned for certiorari in defense of cable modem's regulatory freedom.⁶

By contrast, the Commission has yet to act on other pending proceedings that could give LEC broadband providers some relief. For example, the Commission is considering whether incumbent LECs should be subject to dominant carrier regulation in their provision of Digital

³ Cf. *Brand X* Petition for a Writ of Certiorari (U.S. Sup. Ct. Aug., 2004) ("*Brand X* petition") at 27; Telecommunications Act of 1996, Pub. Law No. 104-104, Section 706(c)(1), 110 Stat. 56, 153 (Feb. 8, 1996).

⁴ *Brand X* petition at 24.

⁵ *Id.* at 15.

⁶ In the Cable Modem Decision the Commission decided that cable modem service should be classified as an interstate information service under Title I of the Communications Act of 1934, meaning that cable modem service is presumptively unregulated. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("Cable Modem Decision"). Although the Ninth Circuit vacated the portion of the Cable Modem Decision that classified cable modem service as an information service, the Supreme Court has granted the Commission's petition for a writ of certiorari seeking to protect the Commission's hands-off policy. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2004), *petition for cert. granted*, 2004 U.S. Lexis 7980 (U.S. Dec. 3, 2004) (No. 04-281).

Subscriber Line (“DSL”).⁷ The Commission is also considering whether access to the Internet over DSL should be regulated under Title II or Title I.⁸ Qwest recently filed its own petition for forbearance from onerous pricing regulations imposed on LEC broadband transmission under Title II, but not imposed on cable modem service.⁹ BellSouth’s petition gives the Commission yet another chance to correct the regulatory asymmetry. Qwest urges the Commission to grant BellSouth’s petition.

II. BECAUSE THERE IS ROBUST INTERMODAL COMPETITION IN BROADBAND TRANSMISSION SERVICES, THE COMMISSION SHOULD FORBEAR FROM THE COMPUTER INQUIRY RULES

The *Computer Inquiry* rules require any LEC that provides an enhanced service, or “information service,”¹⁰ to unbundle and separately provision the transmission component of the service at tariff rates to end users and competing information service providers (and to provide the transmission component to itself pursuant to that tariff).¹¹ These rules were designed to

⁷ *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001).

⁸ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

⁹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest’s xDSL Services* (filed Nov. 10, 2004); *see also* Public Notice, DA 04-3602 (Nov. 16, 2004).

¹⁰ The *Computer Inquiry* unbundling rule applies to a LEC’s provision of “enhanced services,” *see, e.g., In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Notice of Proposed Rulemaking, 11 FCC Rcd 18959, 18984 n.95 (1996). The Commission has confirmed that the terms “enhanced services” and “information services” should be interpreted to extend to the same functions. *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996).

¹¹ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 474-75 ¶ 231 (1980) (“*Computer II*”); *see also, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*,

prevent carriers from using their “*market power* and control over the communications facilities *essential to the provision of enhanced services*” to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market.¹² Indeed, incumbent LECs were often then the only providers of the services that the information service provider required, and “nondiscriminatory access . . . to basic transmission services by all enhanced service providers” was necessary given that that enhanced services were at that time “dependent upon the common carrier offering of basic services.”¹³ Put differently, competing information service providers could not survive unless consumers were able to use the LEC’s transmission service to reach the independent information service. Thus, the unbundling requirement was designed specifically for a one-wire world in which information service providers could obtain transmission *only* from incumbent LECs.

That rationale, of course, has no application in today’s broadband marketplace, which is characterized by both intermodal and intramodal competition. LEC facilities are not essential to the provision of enhanced services. Consumers and Internet service providers (“ISPs”) may purchase broadband transmission services from entirely distinct platform providers, including cable modem providers, wireless providers and satellite providers, as well as from competitive LECs (“CLECs”). These intermodal and intramodal competitors serve, or can serve, the same markets. The fact that consumers and ISPs are not dependent upon LEC broadband transmission

1998 Biennial Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets, Report and Order, 16 FCC Rcd 7418, 7442 ¶ 40 (2001) (noting *Computer II* requirement that all carriers not subject to the separate subsidiary requirement must “acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are used”).

¹² *Computer II*, 77 F.C.C. 2d at 464 ¶ 210 (emphasis added).

¹³ *Id.* at 474-75 ¶ 231.

is demonstrated by simply looking at EarthLink's web page, where the company offers customers "EarthLink cable," "EarthLink satellite," and "EarthLink DSL."¹⁴

The market-share statistics further demonstrate that consumers have choices and that DSL providers do not have market power. DSL service trails cable modem service in market share in the nation as a whole. As of December 2003, cable accounted for almost 60% of all high-speed lines.¹⁵ ADSL accounted for 33.7%.¹⁶ Nationally, Regional Bell Operating Companies provided 30.9% of all high-speed lines.¹⁷ As of December 2003 cable modem accounted for an astounding 75.3% of all advanced service lines (lines over 200 kbps in both directions, a subset of high-speed lines).¹⁸ ADSL accounted for a mere 14.9% of such lines.¹⁹ Given DSL's market share in advanced services, no one can argue that LECs are dominant providers with pricing power over their customers.

Despite its leading market share, the *Computer Inquiry* rules have never been applied to cable modem services. The Commission has tentatively concluded *not* to apply these requirements to cable modem service, even if that service were classified as a telecommunications service.²⁰ Since the unbundling rule is not necessary for the market-leading service, it surely must not be necessary for LEC broadband transmission. Accordingly, the

¹⁴ <http://www.earthlink.net/home/broadband/>.

¹⁵ FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Chart 2 (June 2004).

¹⁶ *Id.*

¹⁷ *Id.* at Chart 9.

¹⁸ *Id.* at Chart 4.

¹⁹ *Id.*

²⁰ Cable Modem Decision, 17 FCC Rcd at 4825-26 ¶¶ 43-47.

Commission must forbear from applying the burdensome panoply of *Computer Inquiry* requirements to LEC broadband transmission services.

A. The *Computer Inquiry* Requirements Are Not Necessary To Ensure That Rates And Practices Are Just, Reasonable, And Not Unreasonably Discriminatory

The first statutory condition for forbearance directs that the Commission determine whether the continued application of the *Computer Inquiry* obligations is necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Qwest agrees with BellSouth that competition will ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. BellSouth has supported this conclusion by pointing to the Commission's own statistics showing cable modem's leading market share, the Commission's *Triennial Review Order* declining to require unbundling of most broadband facilities, as well as analyst reports.

Qwest reminds the Commission of its long-standing conclusion that "the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed."²¹ There can be no question that intermodal competitors have made significant sunk investment in broadband transmission services. According to the National Cable & Telecommunications Association, cable providers spent roughly \$1,200 per customer to upgrade cable infrastructure and launch new broadband services between 1996 and 2003.²² The Commission has recognized the "explosive growth of hotspots,"

²¹ *WorldCom v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001); *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14262 ¶ 78 (1999) ("Pricing Flexibility Order").

²² <http://www.ncta.com/Docs/PageContent.cfm?pageID=37> (visited September 9, 2004).

where a user with a computer or personal digital assistant equipped with a wireless local area network card can connect to the Internet through wireless access points.²³ Two satellite providers, Hughes Network Systems and Starband, currently offer high-speed service to “individuals primarily in small office/home office environments and small businesses.”²⁴ In addition, the Commission has noted that Boeing Corporation and WildBlue Communications will soon launch high-speed Internet access services.²⁵ The availability of all of these alternatives leads to the conclusion that if LECs attempted to charge unjust or unreasonably discriminatory rates, customers would turn to other providers. Accordingly, the Commission must find that the first forbearance condition is met.

B. *Computer Inquiry* Restrictions Are Not Necessary To Protect Consumers

The second statutory condition for forbearance requires that the Commission determine whether enforcement of *Computer Inquiry* regulation is necessary for the protection of consumers. As BellSouth has demonstrated, the *Computer Inquiry* obligations impose significant costs. These added costs not only increase prices for consumers that choose LEC broadband transmission, but also for customers that choose cable modem service, because they diminish competitive pressure on cable modem rates.²⁶

Qwest adds that because other providers — including dominant cable modem providers — stand ready to serve ISPs and provide ISPs with access to their end-user customers, incumbent LECs lack the incentive or the ability either to deny their own end-user customers

²³ See *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 at 18 (2004).

²⁴ *Id.* at 23.

²⁵ *Id.*

²⁶ *BellSouth petition* at 21.

access to those ISPs or to refuse to do business with the ISPs themselves. Qwest clearly views ISPs as major suppliers of its services. An end user can purchase DSL out of Qwest's tariff and choose any one of over 400 ISPs. In addition, Qwest sells "bulk" DSL services to ISPs such as EarthLink and AOL pursuant to tariff. Given the competition to provide broadband transmission to customers, and the desire to gain market share, it is unthinkable that LECs would do anything to harm consumers even in the absence of the *Computer Inquiry* obligations. If the LECs were foolish enough to try to harm customers, then consumers would quickly and easily change broadband transmission service providers.

C. Forbearance From *Computer Inquiry* Obligations Is Consistent With The Public Interest

The third statutory condition for forbearance requires that the Commission determine whether forbearance from *Computer Inquiry* obligations is consistent with the public interest. In making this public interest determination, the Commission considers whether forbearance "would enhance competition." As demonstrated below, forbearance from *Computer Inquiry* restrictions is consistent with the public interest.

Qwest agrees with BellSouth that forbearance would encourage deployment, ensure that broadband services exist in a minimal regulatory environment, and help create a rational framework for regulation across multiple platforms. There can be no logical or legal basis for applying the *Computer Inquiry* regime to LEC broadband transmission services when it does not apply to the directly competitive offerings of cable operators. In the Cable Modem Decision, the Commission refused the invitation "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of

the Act.”²⁷ Given LECs’ trailing market share, there is absolutely no public interest justification to continue to subject LECs to this requirement. Such regulatory disparity significantly skews the competitive environment to the detriment of broadband deployment and consumer welfare generally. Accordingly, the third forbearance condition is met. Because all three forbearance conditions are met, the Commission must forbear from applying the *Computer Inquiry* obligations to LEC broadband transmission.

III. BECAUSE THERE IS ROBUST INTERMODAL COMPETITION, THE COMMISSION MUST FORBEAR FROM TITLE II REGULATION OF LEC BROADBAND TRANSMISSION SERVICES

The Commission has already concluded, subject to notice and comment, that it should forbear from applying Title II and common carrier regulation to the market-leading mass-market broadband service, cable modem. The Commission declared:

“We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing. For these same reasons we tentatively conclude that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory. As such, we believe that forbearance from the requirements of Title II and common carrier regulation is appropriate in this circumstance.”²⁸

The Commission should apply this broad finding not just to the market-leading cable modem service, but also to LEC broadband transmission. Such services are still in their early stages. Supply and demand are still evolving, and several rival networks are still developing. Moreover, cable modem’s leading market share demonstrates that customers neither know nor care whether their service provider is bound by Title II and common carrier rules. Accordingly, forbearance

²⁷ Cable Modem Decision, 17 FCC Rcd at 4825 ¶ 43.

²⁸ *Id.* at 4847-48 ¶ 95.

from the requirements of Title II and common carrier regulation is appropriate.

IV. CONCLUSION

The Commission is required to eliminate regulations that are no longer necessary to ensure that rates and practices are just, reasonable and not unreasonably discriminatory. Competition alone is sufficient to constrain prices, incent deployment and stimulate quality of service improvements. It is not in the public interest to continue heavy-handed regulation of a competitor in a competitive market. For these reasons, the Commission should grant BellSouth's petition and exercise its authority to forbear from applying Title II and *Computer Inquiry* regulation to LEC broadband transmission services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 04-405, 2) served, via e-mail on Ms. Janice M. Myles, Wireline Competition Bureau, Competition Policy Division at janice.myles@fcc.gov, 3) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com, and served via First Class United States mail, postage prepaid, on the party listed on the attached service list.

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